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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~4117~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

BRIEF OF HAZELTINE RESEARCH, INC. IN OPPOSITION TO ZENITH'S PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1117

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

BRIEF OF HAZELTINE RESEARCH, INC. IN OPPOSITION TO ZENITH'S PETITION FOR A WRIT OF CERTIORARI

FOREWORD

The most significant thing about Zenith's petition for a writ of certiorari is that in both substance and form it is substantially a verbatim copy of its petition for a writ of mandamus (Misc. No. 1338).

The ground for certiorari which Zenith asserts is precisely the same as in Zenith's petition for mandamus, namely, the question of alleged violation of the mandate of this Court by the Court of Appeals. Zenith says in its petition for certiorari (p. 2):

> "*The relief here sought* is a determination of *whether or not* the Court below has *disregarded* the mandate of this Court and in effect reversed the decision of this

> Court by vacating the judgment of the District Court awarding damages to Petitioner, Zenith Radio Corporation, for violation of the antitrust laws by Hazeltine Research, Inc. and the Canadian Patent Pool."[1]

This is the *same statement* as to "The relief here sought" which appeared at page 4 of Zenith's petition for writ of mandamus, except that the words "and in effect reversed the decision of this Court" have been added in the current petition. In other words, Zenith has filed two petitions asking for the same relief.

At the beginning of our Argument, we provide a brief comparison of the two petitions, showing their substantial identity (note 7, *infra*).

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit has now been printed in the official Federal Reporter. The citation is *Hazeltine Research, Inc.* v. *Zenith Radio Corporation*, 418 F.2d 21 (7th Cir. 1969). Since we have previously cited this opinion as "Slip Opinion . . ." in the briefs filed in opposition to Zenith's mandamus petition, we shall continue to do so in this brief. The slip opinion has been reproduced as Appendix A to this brief.

QUESTIONS PRESENTED

Zenith petitions for a writ of certiorari. Although Zenith sets forth nine "Questions Presented" instead of the seven asserted on its petition for writ of mandamus, the basic issue presented is precisely the same in both petitions (see p. 1, *supra*). This issue, as we have pointed out (HRI

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[1] Emphasis appearing in quotations has been added by us unless otherwise indicated.

Br. Opp. Mand. 2)[2] is: Whether the Court of Appeals, on remand for further proceedings following reversal by this Court on the single issue as to whether Zenith had proved some injury to its Canadian business, had the authority to rule on the affirmative defenses of Hazeltine Research, Inc. (HRI) and to remand for further hearings on the amount of recoverable damages, those issues having previously been left undecided both by the Court of Appeals and by this Court.

This basic question includes the subordinate issues:

(a) whether the Court of Appeals had authority to determine whether the affirmative defenses of release and limitations were in the case;

(b) having decided that these defenses were in the case and that they had been rejected by the trial court on the merits, whether the Court of Appeals had authority to determine that the trial court erred in that rejection; and

(c) having decided that the affirmative defenses barred Zenith's recovery of damages resulting from the acts of the Canadian pool prior to the release and to the limitations period, whether the Court of Appeals had authority to order further hearings

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[2] The following abbreviations are used in this brief:

Z. Pet. Mand.	Zenith's Motion and Petition for Mandamus
Z. Reply Mand.	Zenith's Reply to Brief of HRI in Opposition to Zenith's Petition for Mandamus
Z. Pet. Cert.	Zenith's Petition for Certiorari
HRI Br. Opp. Mand.	Brief of Hazeltine Research, Inc. in Opposition to Zenith's Petition for Mandamus
HRI Reply Br. Opp. Mand.	Reply Brief of Hazeltine Research, Inc. in Opposition to Zenith's Petition for Mandamus
A.	Citations to the printed Appendix

on the amount of recoverable damages in light of the fact that a major portion of the original damage award was based on such pre-release and pre-damage period conduct (see HRI Br. Opp. Mand. 2).

Zenith also purports to raise questions of alleged error by asserting that the Court of Appeals made a holding with regard to tolling of the Statute of Limitations (15 U.S.C. § 15b), and a holding limiting Zenith's damages to those flowing from a letter of June 5, 1959, when, in fact, the Court of Appeals made no such holdings (see pp. 33-38 and 32-33, *infra*).

STATEMENT OF THE CASE

Zenith's Statement of the Case again misstates both the decision of this Court and of the Court of Appeals on remand. Zenith's petition attempts to obscure the fact that this Court reversed the Court of Appeals' judgment as to Canada *solely* on the fact of damage issue, leaving the remaining undecided issues for consideration by the Court of Appeals. On remand, the Court of Appeals in no way disturbed or questioned the decision of this Court.

In view of Zenith's misstatements concerning these opinions, HRI sets forth the following additional statement of the pertinent facts (see also HRI Br. Opp. Mand. 3-9).

I. The Court of Appeals' Decision of December 19, 1967 (388 F.2d 25). HRI appealed from the antitrust damage judgments awarded by the trial court granting Zenith over $34,000,000 in treble damages based on Zenith's alleged loss of sales and profits from May 22, 1959 to May 22, 1963, claimed to have been caused by patent pools in Canada, England and Australia. On that appeal HRI urged several grounds for reversal, including failure to prove the fact of damage, the bars of the statute of limitations and

the 1957 releases in the RCA-Zenith litigation,[3] and the contention that the damages awarded were excessive. The Court of Appeals reversed the trial court's treble damage judgments as to all three countries *solely* on the basis of Zenith's failure to prove the "fact of damage," stating that:

> "We agree with HRI that Zenith failed to sustain the burden of proving the essential *fact* of damage in the relevant period. *We need pass on no other contention, therefore,* in reversing the judgment on the counterclaim" (388 F.2d at 35).

Thus the Court of Appeals' reversal was based solely on the failure to prove the fact of damage and the other issues were left undecided (see HRI Br. Opp. Mand. 3-4).

II. This Court's Decision of May 19, 1969 (395 U.S. 100). This Court, in reversing the Court of Appeals as to Canada, did so solely on the "fact of damage" question, carefully noting that there were several "major points" raised by HRI which the Court of Appeals had not yet passed on (395 U.S. at 113). This Court said:

> "We have concluded that *the Court of Appeals erred* in setting aside the District Court's decision *with respect to the fact of damage in Canada.* Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured *to some extent* by the Canadian pool's re-

[3] HRI urged that the releases barred recovery for all present, past and future damages, including damages claimed to have been suffered during the period May 1959 to May 1963, resulting from acts of the pool taking place prior to the date of the releases on September 27, 1957, and that, as an alleged co-conspirator, HRI was entitled to assert this defense (see 395 U.S. at 113).

straints upon imports of radio and television sets" (395 U.S. at 114).[4]

Contrary to Zenith's representations, this Court did not decide the other issues on the Canadian damage claim raised by HRI in the Court of Appeals, but did comment on them:

(a) The Court referred to the question whether the trial court's failure to give effect to the defenses of release and limitations was a ruling on the merits or was on the ground of waiver, but pointed out that "the parties have not argued the matter" and stated it would not pass on this issue (395 U.S. at 117 n. 13) (see pp. 19-21, *infra*).

(b) The Court referred to the question of the effect of the 1957 releases, indicated their apparent relevance (395 U.S. at 113 n. 7), but did not rule on the effect to be given them (see p. 23, *infra*).

(c) The Court referred to the question whether the statute of limitations barred recovery of damages resulting from pre-damage period conduct, but pointed out that the matter had not been argued and stated it would not "deal with the question of whether damage period injury from pre-damage period conduct is recoverable . . ." (395 U.S. at 117 n. 13) (see pp. 23-24, *infra*).

(d) The Court recognized the potential effect of the defenses on the amount of recoverable damages, pointing out that the damages awarded by the trial court as to Canada had been on the assumption that absent the activities of the Canadian pool, Zenith "*would have had 16%* of

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[4] However, this Court agreed with the Court of Appeals in setting aside the judgments as to England and Australia on the ground that the "fact of damage" had not been proved (395 U.S. at 114). It also agreed that the judgments against Hazeltine Corporation were properly vacated (395 U.S. at 110).

the Canadian television market on May 22, 1959, and throughout the damage period *rather than its actual 3% share*" (395 U.S. at 116). The Court stated:

> "Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, *those operations must have occurred prior to May 22, 1959.* Some of the damages awarded, therefore, *necessarily resulted from pre-damage period conduct*" (395 U.S. at 116-17).

Thus, if held to apply, the affirmative defenses necessarily barred a major part of the $18,892,173 award of the trial court.

Having reversed the Court of Appeals' ruling solely on the fact of damage issue, this Court remanded "for further proceedings consistent with this opinion" (395 U.S. at 141). This "single issue" reversal left the remaining undecided issues for decision by the Court of Appeals (see pp. 13-16, *infra;* see also HRI Br. Opp. Mand. 11-16).

III. The Court of Appeals' Remand Decision of October 27, 1969 (418 F.2d 21; Slip Opinion). On remand the Court of Appeals did not disturb or question this Court's holding on the fact of damage but recognized it was bound by that holding. It considered only the questions which it had originally left undecided with respect to Canada, acknowledging that this Court had "concluded we erred in our determination that Zenith had failed to prove the 'fact' of damage in Canada" (Slip Opinion 2). The Court of Appeals concluded that the issues remaining before it on remand were the following:

> "(1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had on HRI's

liability; and (3) whether the award of damages was excessive. *These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith*" (Slip Opinion 2).

The Court of Appeals decided:

(a) that the defenses of release and limitations had not been waived, and that the trial court had considered and (erroneously) denied them on their merits (Slip Opinion 3);

(b) that HRI as an alleged joint tortfeasor was entitled to the benefit of the September 27, 1957 releases in the RCA-Zenith litigation and that these releases barred recovery for "past, present and *future damages* [emphasis by the Court] flowing from any misconduct of HRI prior to to the dates of the releases" (Slip Opinion 4); and

(c) that the limitations defense was a bar to Zenith's recovery for damages resulting from conduct which occurred prior to the start of the damage period (*i.e.*, prior to May 22, 1959) (Slip Opinion 4-5, 6-7), so that Zenith's recovery was limited to damages resulting from conduct "occurring in the damage period" (Slip Opinion 5).[5]

The bar to recovery imposed by the releases and statute of limitations necessarily reduced the amount of recoverable damages and, accordingly, the Court of Appeals remanded the case to the District Court for further hearings as to the amount of damages recoverable. In so doing, the Court of Appeals pointed to this Court's analysis which showed that the original award of $18,892,173 granted by

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[5] Contrary to Zenith's assertions, the question whether or not the statute of limitations is tolled as against a party in a civil action who was not a defendant in government litigation was not before the court (see pp. 33-38, *infra*).

the trial court was based on the assumption that but for pre-damage period conduct, Zenith would have started the four-year period with 16% of the market instead of the 3% it actually had, and that "some part of the damages awarded, therefore, *necessarily* resulted from pre-damage period conduct" (395 U.S. at 116-17; Slip Opinion 3-4). Since Zenith started the damage period with less than one-fifth of the market share which it claimed it should have had (3% instead of 16%), necessarily a major portion of the original award was for damages claimed to have resulted from pre-release and pre-damage period conduct. Thus, the Court of Appeals had the power and the duty to remand the case to the trial court for further hearings to determine the amount of damages resulting from damage causing conduct taking place during the period, excluding damages resulting from pre-damage period and pre-release conduct (Slip Opinion 7).[6]

SUMMARY OF ARGUMENT

No basis is presented for a writ of certiorari. The Court of Appeals did not exceed its authority under the mandate of this Court in *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and did not make the alleged "holdings" which Zenith asserts as constituting error.

The Court of Appeals, in its original decision, held only that Zenith had failed to prove the essential fact of damage. HRI had urged a number of other grounds for reversal in

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[6] Contrary to Zenith's assertion the Court of Appeals did not hold that on remand Zenith's recovery was limited to any damages resulting from the June 5, 1959 letter from the pool to Zenith, but pointed to the letter as an example of conduct taking place during the period which could form the basis for a damage award (see pp. 32-33, *infra*).

the Court of Appeals, including the points that a recovery of all or part of the damages was barred by the affirmative defenses of release and limitations, and that the damage award was excessive. However, the Court of Appeals, concluding that the fact of damage had not been proved, did not find it necessary to rule on any of these other grounds for reversal.

This Court reversed that part of the decision of the Court of Appeals which held that Zenith failed to prove the fact of damage as to Canada. This Court, like the Court of Appeals, did not pass upon the question whether the defenses of the statute of limitations and release were in the case, nor as to their legal effect, nor the amount of damages recoverable in light of those defenses. However, the Court did comment upon these defenses and their potential effect to limit the amount of recoverable damages. Having reversed solely on the fact of damage issue this Court remanded the case to the Court of Appeals "for further proceedings consistent with this opinion" (395 U.S. at 141).

Under the mandate of this Court, the Court of Appeals had the authority, and the duty, to decide those issues left undecided by its previous decision and not passed on by this Court. The Court of Appeals therefore had the authority to determine whether the affirmative defenses of release and of limitations were in the case, to decide their legal effect, and to order further hearings in the trial court on the amount of recoverable damages, in light of its decision that the defenses of release and limitations barred recovery of damages resulting from pre-release and pre-damage period conduct.

The further hearings will not constitute a "new trial," but regardless of how designated, the Court of Appeals had

the power to order the hearings. The trial court had made erroneous rulings of law in failing to recognize that the release and statute of limitations barred recovery based on pre-damage and pre-release period conduct, and the hearings are necessary to permit a finding as to the amount of recoverable damage.

The Court of Appeals did not hold that Zenith's recovery is limited to damages resulting from the June 5, 1959 letter from the Canadian patent pool to Zenith. Rather it held that Zenith is entitled to recover any damages occurring during the damage period as the result of conduct which took place during the damage period.

The Court of Appeals did not make a holding that the statute of limitations cannot be tolled by government litigation to which a defendant in a civil suit was not a party, but pointed out that the issue of tolling was not raised in the trial court and was not before the Court of Appeals. The fact is that Zenith affirmatively foreclosed itself from asserting tolling for the purpose of claiming recovery of damages resulting from conduct taking place prior to May 22, 1959 (the start of the damage period). To obtain leave to file its counterclaim on May 22, 1963, over three years after its answer, Zenith represented by its motion and sworn affidavit of its counsel that the matters causing the damages for which it sought recovery had occurred after the filing of its answer, i.e., after April 7, 1960.

Zenith's novel theory that it should be granted a treble damage judgment of $18,892,173, even though a major part of the alleged damages is barred by the 1957 releases and statute of limitations, has no basis. There is also no basis for Zenith's attempted pose as an embattled litigant being denied justice by a prejudiced Court of Appeals. In fact, Zenith is attempting to obtain a recovery of millions of dollars to which it is not legally entitled.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Zenith seeks the same relief (on the same grounds) in its certiorari petition as it did in its petition for mandamus. Thus, Zenith states in both petitions that "The relief here sought is a determination of whether or not the Court below has disregarded the mandate of this Court . . ." (Z. Pet. Mand. 4; Z. Pet. Cert. 2). According to Zenith, this Court's opinion stripped the Court of Appeals of the power to make any ruling other than to reinstate the original treble damage award of $18,892,173 for Canada.

For the Court's convenience, a brief comparison appears in the footnote, showing the substantial identity between Zenith's two petitions.[7]

As we have pointed out (HRI Br. Opp. Mand. 10-39), there is no merit in any of Zenith's arguments.

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[7] The petition for certiorari lists nine "Questions Presented" (pp. 2-4), in substance covering the same ground as the seven "Questions Presented" in the petition for mandamus (Z. Pet. Mand. 4-6). In several instances the questions are identical. The Statement of the Case is identical in both petitions except in some argumentative additions at the end (Z. Pet. Cert. 7). Both Statements are inaccurate and misleading.

As to the Argument, Section I in the petition for certiorari (pp. 8-15), is substantially a verbatim copy of Section I in the petition for mandamus (pp. 9-16); the proposition of the two petitions are different in language but not in substance. Sections II, III and IV of the petition for certiorari (pp. 15-17, 18-20, 20-23, respectively), are substantially the same as Section II of the petition for mandamus (pp. 16-23), in effect a subdivided version. Section V of the petition for certiorari (pp. 24-25) is an abbreviated version of Section III of the petition for mandamus (pp. 23-25).

I. Zenith's Contention That This Court's Mandate Foreclosed the Court of Appeals on Remand From Ruling on Undecided Issues is Contradicted by the Decisions of This Court.

This contention was answered at pages 11-16 of HRI's brief in opposition to Zenith's mandamus petition.

The substance of Zenith's "lack of jurisdiction" argument is that this Court's remand to the Court of Appeals "for further proceedings consistent with this opinion" (395 U.S. at 141) did not give the Court of Appeals jurisdiction or authority to pass on the remaining undecided issues, and that on remand a lower court has no authority to pass on the remaining undecided issues unless this Court has specifically listed those issues and specifically directed the lower court to pass on them (see, *e.g.*, Z. Pet. Cert. 7, 9, 17, 24).

Contrary to Zenith's contentions, the Court of Appeals had the power, and the duty, to rule on the issues of HRI's affirmative defenses and the amount of recoverable damages. The cases cited in HRI's brief in opposition to Zenith's mandamus petition (pp. 12-15) demonstrate conclusively that a lower court has the authority to consider undecided issues on remand following a "single issue" reversal by this Court. This procedure has been well established at least since *Ex parte French*, 91 U.S. 423 (1875). In that case, several defenses had initially been pleaded but the trial court held for defendant on one defense, without passing on the others. This Court had, in an appeal from that decision, reversed the trial court on the ground that the ruling was erroneous and "remanded with directions to proceed in conformity to this opinion," *French* v. *Edwards*, 88 U.S. (21 Wall.) 147, 151 (1874). The lower court, on remand, set the case down for a new trial and the defendant, like Zenith here, sought review in this Court, contend-

ing that the Court's mandate required entry of judgment in his favor. In denying review the Court held that:

> "The finding brought here for review was special, *and met only a part of the issues.* If the conclusion of law to which the court came was correct, the other issues were immaterial. *The case was disposed of without reaching them.* We have, however, determined that the facts found were not sufficient to justify the conclusion reached; and have ordered the court to proceed with the case, notwithstanding the finding. *In effect, we have decided that the court erred in not proceeding to try the other issues. Our action only precludes that court from adjudging in favor of the defendants upon the special facts found and sent here for our opinion. In all other respects, it is at liberty to proceed in such manner as, according to its judgment, justice may require*" (91 U.S. at 426).[8]

Zenith persists in urging that this Court's decision in *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895) supports its contention that the Court of Appeals was without power to rule as it did in this case (Z. Pet. Cert. 8-9; see also Z. Pet. Mand. 9-10). However, as HRI pointed out (HRI Br. Opp. Mand. 13), that case expressly sanctions the procedure employed by the Court of Appeals in this case. In *Sanford,* during proceedings in the circuit court following reversal by this Court on a single issue, defendants moved for judgment in their favor, contending that the mandate of this Court required the entry of such a judgment. When the lower court denied the motion, defendants sought a writ of mandamus. In denying the petition, this Court held that "the Circuit Court may consider and decide

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[8] See *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 168 (1939); *General Investment Co.* v. *Lake Shore & Michigan Southern Ry.,* 260 U.S. 261, 284-85 (1922); see also cases cited at note 9, *infra.*

any matters left open by the mandate of this court" (160 U.S. at 256).

When a case is reversed by this Court on one issue and remanded, it is neither necessary nor usual to give express instructions to the lower court to decide the remaining issues. HRI cited numerous decisions of this Court showing that a remand "for further proceedings consistent with this opinion" constitutes all the instruction necessary to the lower court to decide any remaining issues, consistent with the opinion (HRI Br. Opp. Mand. 14). For the Court's convenience, those citations are set forth again in the footnote.[9]

As previously noted (HRI Br. Opp. Mand. 15), when an appellate court intends to depart from the normal procedure in remanding a case and takes the unusual step of foreclosing consideration of remaining issues, "it is to

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[9] *Ex parte French*, 91 U.S. 423 (1875) (discussed pp. 13-14, *supra*); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 258 (1895) (remand by this Court for further proceedings after a single issue reversal left the lower court free to decide the remaining issues and did not require entry of judgment for either party); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 168 (1939) (mandate controls all matters within its compass, but the lower court is free as to all other issues on remand); *General Investment Co.* v. *Lake Shore & Michigan Southern Ry.*, 260 U.S. 261, 284-85 (1922) (reversal by an appellate court on single issue does not preclude consideration of other issues in lower court); *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 704 (1967), and following remand, *Continental Baking Co.* v. *Utah Pie Co.*, 396 F.2d 161, 163, 195-96 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968) (following a single issue reversal by this Court and remand "for further proceedings," the court of appeals decided the remaining issues and remanded for a new trial; Utah Pie petitioned for a writ of certiorari, contending that the action of the Tenth Circuit was in conflict with this Court's decision on the single issue, and this Court denied certiorari).

be presumed that it would . . . [do] so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose" *Rogers* v. *Hill*, 289 U.S. 582, 587 (1933). That is precisely what this Court did in *Perkins* v. *Standard Oil Co.*, . . . U.S. . . . ., 89 S.Ct. 1871 (1969), decided by this Court on June 16, 1969, less than a month after the decision in the instant case. That was a treble damage action in which the Court of Appeals had set aside the verdict of the jury and judgment of the trial court, and this Court, following its reversal of the Court of Appeals' ruling, stated:

> "The jury's verdict and judgment should be reinstated. It is so ordered.
>
> "Verdict and judgment reinstated" (89 S.Ct. at 1875).[10]

In the instant case this Court did not foreclose the Court of Appeals from considering undecided issues and did not order that the trial court's judgment as to Canada for $18,892,173 "should be reinstated." Instead, it remanded "for further proceedings" so that the Court of Appeals could proceed to pass upon the undecided issues.

II. This Court Decided Only That Zenith Had Established the Fact of Damage as to Canada and Did Not Rule on Other Issues Relating to the Canadian Damage Claim.

This point was discussed at pages 16-18 of HRI's brief in opposition to the petition for mandamus.

In reviewing the decision of the Court of Appeals this Court pointed out that although HRI raised a number of "major points" in the Court of Appeals, including the de-

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[10] See *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 429 (1959).

fenses of statute of limitations and release and the issue as to the amount of recoverable damage, the Court of Appeals had reversed the trial court's judgment as to Canada *solely* on the basis of its "overriding judgment" that Zenith had not established the fact of damage (395 U.S. at 113, 118).

This Court also pointed out that the Court of Appeals had reversed the treble damage awards solely on the fact of damage issue *"without reaching* any of the other issues presented by the appeal on this phase of the case" (395 U.S. at 107) and again, that:

> "*Passing the other issues* pressed by HRI, including the limitations defense, the Court of Appeals held that Zenith had failed to prove any injury to its export business during the damage period . . ." (395 U.S. at 113).

Although this Court agreed with the decisions of the Court of Appeals in setting aside the judgments as to England and Australia (395 U.S. at 114), it reversed the Court of Appeals as to Canada solely because the Court of Appeals had erred in concluding that the "fact of damage" had not been proved, stating:

> "We have concluded that the Court of Appeals *erred* in setting aside the District Court's decision *with respect to the fact of damage in Canada.* Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had *in fact been injured to some extent* by the Canadian pool's restraints upon imports of radio and television sets" (395 U.S. at 114).

This Court made it clear that its decision was limited to the issue of whether there had been proof of some injury to Zenith's business, *i.e.,* fact of damage, and was not a

ruling on the amount, saying that proof that Zenith had been injured "to some extent" met Zenith's burden of proving "the fact of damage," and that "inquiry *beyond this minimum point goes only to the amount* and not the fact of damage" (395 U.S. at 114 & n. 9).

In reversing the Court of Appeals' holding that no injury during the damage period was shown resulting "from pool activities either *before or after* the beginning of the damage period" (395 U.S. at 113), this Court pointed out that the fact of some damage was shown by the record to have resulted not only from pre-damage period conduct but also from conduct during the damage period. The Court held that the evidence warranted "the inference that CRPL's *past conduct* interfered with and made more difficult the distribution of Zenith products in 1959 and later years" (395 U.S. at 118), and also held "that the record evidence is sufficient to support a finding of damage resulting from events occurring *after* the beginning of the damage period" (395 U.S. at 119).

The effect of these conclusions was that even if Zenith's right to a recovery for damages based on pre-damage period conduct was barred by limitations or by the September 27, 1957 releases, *nevertheless* Zenith could assert a claim to recovery to the extent that the damages suffered during the damage period were due to damage period conduct. Thus, it was not necessary for this Court to rule upon the applicability or effect of the defenses of limitations or release or the *amount* of damage issue. Indeed, it would have been highly unusual for this Court to have done so in view of its limited holding and the limited holding of the Court of Appeals. The defenses of limitation and release and the question of the amount of recoverable damage, had no relevancy in the determination of the *fact* of damage issue (see pp. 25-26, *infra*).

III. The Decision of the Court of Appeals on Remand Was Clearly Within the Authority of This Court's Mandate.

A. The Court of Appeals Did Not Question the Decision by This Court on the Fact of Damage Issue but Considered Only the Questions Left Open by its Previous Opinion and Left Undecided by This Court.

This point was discussed at page 19 of HRI's brief in opposition to the mandamus petition.

The Court of Appeals in its second decision recognized that its ruling on the "fact of damage in Canada" had been reversed, that it was bound by that decision, and then proceeded to pass on the issues of release and limitations and their effect on the amount of recoverable damages, stating:

> "These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith" (Slip Opinion 2).

B. The Court of Appeals Had the Authority to Rule on Whether the Affirmative Defenses Were in the Case.

This point was discussed at pages 19-24 of HRI's brief in opposition to the petition for mandamus.

This Court referred to the question whether the defenses of release and limitations were in fact in the case, pointing out that the trial court had over Zenith's objection granted "leave to file" these defenses prior to entry of judgment, and then "without further mention of these defenses, forthwith refused to set aside or remand the damage award as to Canada," leaving open the question whether the trial court's action was based on a rejection of the defenses on the merits or on the ground of waiver (395 U.S. at 117

n. 13). Thus, this Court stated, the trial court "*either* reject[ed] the statute of limitations defense *or* consider[ed] it to have been waived," but that:

> "The parties have *not argued* the matter here, and *we make no further effort to penetrate the confusion surrounding this issue* [*i.e.*, whether the defenses were rejected on the merits or on the ground of waiver] or to deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted" (395 U.S. at 117 n. 13).[11]

The Court of Appeals ruled on this undecided question, as it had an obligation to do, and decided that the trial court's failure to give effect to the defenses was on the (erroneous) ground that they had no merit, and not on the ground of waiver. Pointing out that the trial court permitted the defenses to be filed over Zenith's objections, and then denied HRI's motion to dismiss based on the defenses, the Court of Appeals stated:

> "It is our view that the court's ruling was *not* on the basis of *waiver, but* because the defenses on *their merits* did not bar Zenith's recovery. We turn therefore to consideration of the correctness of the district court's ruling" (Slip Opinion 3).

Zenith repeats its previous argument that this Court ruled that the defenses had been waived, because of its reference to the affirmative defenses as "belatedly raised" (in the sense that they had not been pleaded in the original answer to the counterclaim), and argues that by use of the words "unwaived" and "properly asserted," this Court had

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[11] Since the Court was referring to both defenses of limitations and release in the discussion and referred to the fact that the trial court had granted leave to file both defenses, the statements in this Court's footnote 13 concerning the limitations defense obviously applied to both defenses.

thereby made a "clear holding that the trial court had properly ruled that those defenses were not in the case" (Z. Pet. Cert. 11). As pointed out in answering this same argument previously (HRI Br. Opp. Mand. 21 n. 10), these words were used in connection with the statement of this Court that it was *not ruling* on the question of waiver, or the effect of the defenses if properly asserted (395 U.S. at 117 n. 13). Moreover, the Court was clearly aware that the Court of Appeals had not yet ruled on these defenses (395 U.S. at 113).

Although Zenith attacks the Court of Appeals' ruling on the false ground of lack of jurisdiction to rule, it should be pointed out again (see HRI Br. Opp. Mand. 21-24) that the record amply supports the correctness of the Court of Appeals' ruling. The trial court granted leave to file these pleas over Zenith's objection that "I think it is too late" (A. 3037). The trial court clearly understood that by its motion HRI was "seeking to file these new pleadings" (A. 3037) and granted leave to file them (A. 3037) *nunc pro tunc* as of April 1, 1965, before entry of judgment (Court of Appeals Appendix 2043). After the defenses were pleaded (A. 3049-53), HRI's motion to dismiss the counterclaim on the basis of the defenses was filed (A. 3048), denied (A. 3062), and judgment thereafter entered as to Canada (A. 3078-80).

If the trial court had considered the defenses waived, it would not have granted leave to file them over Zenith's objection (see, *e.g., Groninger* v. *Davison,* 364 F.2d 638, 639-40 (8th Cir. 1966) (grant of leave to file limitations defense held to negate any contention that the trial court considered the defense waived); see also HRI Br. Opp. Mand. 22-23). Moreover, Zenith's argument that failure to file the defenses with the original answer is "final and conclusive" (Z. Pet. Cert. 10), completely ignores the cases which we previously cited (HRI Br. Opp. Mand. 23), which

show that the trial court has discretion to permit amendment when justice requires (see, *e.g.*, *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714, 717-18 (7th Cir. 1956)).

The grant of leave to file these defenses was particularly appropriate here because the defenses were not relevant to the counterclaim as pleaded and became relevant only after the trial and the findings prepared by Zenith and adopted by the trial court, which for the first time revealed that Zenith was claiming damages flowing from pre-damage period conduct (see HRI Br. Opp. Mand. 24; pp. 35-37, *infra*).

It is apparent that in failing to give any effect to the defenses of limitations and releases, the trial court erroneously believed they could not constitute a meritorious defense, for this Court pointed out (395 U.S. at 116), as did the Court of Appeals (Slip Opinion 3), that "the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period" (see HRI Br. Opp. Mand. 24).

Indeed, as we have previously pointed out (HRI Br. Opp. Mand. 24), Zenith has heretofore admitted that the trial court did grant leave to file the pleas, for at page 16 of its reply brief to this Court, Zenith said:

> "The trial court *permitted the filing* of the pleas as of a date a year after the trial (A. 3037), and then promptly overruled the motion to dismiss the counterclaim on this ground (A. 3037)."

C. The Court of Appeals Had the Authority to Rule on the Effect of the Affirmative Defenses.

This point is reviewed at pages 25-28 of HRI's brief in opposition to the petition for mandamus.

Since the effect of the affirmative defenses on the amount of recoverable damages was not ruled on in the original

decision by the Court of Appeals, this Court did not decide the effect to be given to them. Rather, it left it to the Court of Appeals to decide whether they were in the case, and if so, what their effect might be (pp. 6-7, *supra*). This Court did, however, indicate the potential significance of those defenses on the amount of recoverable damages.

With respect to the September 27, 1957 releases in the RCA-Zenith litigation this Court did not rule on their effect, but it observed that "the 1957 release appears to be relevant only to Zenith's claim for injury to its Canadian trade . . ." (395 U.S. at 113 n. 7).[12] The Court of Appeals was clearly within the authority of this Court's mandate when it decided the effect of the releases on recovery of damages (Slip Opinion 4).

As concerns the limitations defense, this Court stated that although the defense was one of HRI's "major points" which had not been reached in the Court of Appeals (395 U.S. at 113), "the parties have not argued the matter here," and that:

> "*we make no further effort . . . to deal with the question of whether damage period injury from pre-damage period conduct is recoverable* where an un-

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[12] Irrespective of the application of the statute of limitations, some substantial portion of Zenith's damage claim was traceable to acts occurring prior to the September 1957 releases, and was thus barred if the releases were given effect. Indeed, in its proposed findings, Zenith relied on conduct dating back to *1926* as a basis for recovery (Findings XXV- XXX, XXXVI, A. 2903-06, 2908). Zenith entered the Canadian market in 1958 following the release (A. 2905), and this Court pointed out that "it could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning [*i.e.*, before 1958], and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed" (395 U.S. at 118-19).

waived statute of limitations defense is properly asserted" (395 U.S. at 117 n. 13).

The Court of Appeals was therefore clearly within its power under this Court's mandate when it decided this issue on remand.

Zenith's attack on the rulings by the Court of Appeals on these defenses is primarily directed to the argument that the Court of Appeals had no power to rule, rather than on the correctness of the rulings as a matter of law (see Questions Presented 2-3, Z. Pet. Cert. 2). In any event, the Court of Appeals was clearly correct in its rulings on the effect of the affirmative defenses.

As to the release defense, the cases relied on by the Court of Appeals, as well as the language of the releases themselves, amply support the conclusion that HRI, as an alleged co-conspirator, had the benefit of the releases and that they barred recovery of "past, present and *future damages*" [emphasis by the Court] resulting from acts taking place prior to the date of the releases (Slip Opinion 4; A. 3051-52). Thus, any damages suffered by Zenith during the 1959-1963 period as a result of pool activities taking place prior to September 27, 1957, including any interference with the build-up of a Canadian market from which Zenith could have profited during the 1959-1963 period, were barred.

As concerns the limitations defense, the Court of Appeals' ruling that the statute bars recovery of damages resulting from pre-damage period conduct (Slip Opinion 4-5, 6-7) is entirely in accord with the overwhelming weight of authority (see cases cited Slip Opinion 4-5).

Zenith makes a variety of miscellaneous arguments to the effect that the Court of Appeals should be considered to have no jurisdiction to rule on HRI's affirmative defenses or

to remand for further proceedings in light of those rulings. We have answered all these arguments previously (see HRI Br. Opp. Mand. 10-39). However, since Zenith persists in contending that this Court made various rulings which stripped the Court of Appeals of authority to act, it is appropriate to comment briefly here on the "holdings" which Zenith ascribes to this Court's decision.

At page 9 of its current petition Zenith asserts that in order to conclude that it had authority to take action, "the court below had to reverse this Court on three important and controlling decisions in this case" (see also Z. Pet. Mand. 10-11). According to Zenith these "controlling decisions" were:

> "First, the holding of this Court that the defenses of limitations and release were 'belatedly raised' and therefore waived. Second, that acts showing fact of damage outside the damage period were not barred by release or limitations; and third, that acts subsequent to May 22, 1959 were sufficient to support the damage findings."

No such rulings were made by this Court:

1. As to the contention that this Court held HRI's affirmative defenses waived, as we have already shown (see pp. 19-21, *supra;* see also HRI Br. Opp. Mand. 19-21), this Court pointed out unequivocally that it was *not* ruling on the question whether the defenses were waived (395 U.S. at 117 n. 13).

2. Zenith's contention that this Court held that damages based on pre-damage period conduct were not barred by the defenses of release and limitations (see Z. Pet. Cert. 13-14, 22-23; Z. Pet. Mand. 13-14, 22) is based on the argument that "if pre-damage period conduct can be considered on the fact of damage issue, it must be relevant and com-

petent evidence as to the amount of damage" (Z. Pet. Cert. 12; Z. Pet. Mand. 13). This is a complete *non sequitur*.

As we have pointed out (HRI Br. Opp. Mand. 27-28; see pp. 18-19, *supra*), in ruling on the fact of damage issue this Court was considering only whether the Court of Appeals was correct in its holding "that Zenith had not been damaged after May 22, 1959, by any act of the pool, whether occurring before or after that date" (395 U.S. at 118). The issue considered was the ruling of the Court of Appeals on the question of injury and causation (*i.e.*, fact of damage), and although the affirmative defenses might later be held on remand to constitute a legal bar to recovery of a portion of the original amount of damages awarded, that had nothing to do with the question of whether the Canadian pool had actually injured Zenith's business. Therefore, it was unnecessary for this Court to consider these affirmative defenses in determining the issue of fact of damage. However, it was appropriate for this Court to consider pre-damage period conduct (as well as damage period conduct) on the fact of damage question, because pre-damage period conduct could be the basis for additional recovery if the Court of Appeals should decide *either* that the affirmative defenses had been waived *or* that they did not bar recovery based on pre-damage period conduct. It should be noted that in any event, Zenith could recover damages to the extent they resulted from damage period conduct.

3. In again arguing that this Court held "that acts subsequent to May 22, 1959 were sufficient to support the damage findings" (Z. Pet. Cert. 9, Z. Pet. Mand. 11), Zenith seeks to obscure the fact that this Court's ruling related *solely* to the fact of damage issue (395 U.S. at 114 n. 9). Moreover, in describing the measure of damages allowed by the trial court, this Court made it unequivocally clear that the $18,892,173 treble damage award *could not* be sustained solely on the basis of acts of the Canadian pool subsequent to May 22, 1959, when it stated:

> "Some part of the damages awarded, therefore, necessarily resulted from pre-damage period conduct" (395 U.S. at 116-17).

In fact, since the damage award was based on the assumption that Zenith should have started the damage period with an established market of 16%, rather than the 3% it actually had, it was obvious that a *very large part* of the award was based on pre-damage period conduct.

Clearly, the reason that (1) the Court reviewed damage period conduct separately from pre-damage period conduct—(2) the Court pointed out the extent to which the original damage award was based on pre-damage period conduct—(3) the Court pointed to the existence of the issue as to whether or not the affirmative defenses had been waived—(4) the Court pointed out that it was not deciding the question whether or not recovery could be had on the basis of pre-damage period conduct—and (5) the Court, without deciding the issue, observed that the release "appears to be relevant" (395 U.S. at 113 n. 7)—was to point out the questions remaining to be decided by the Court of Appeals and to give the court below the benefit and guidance of this Court's comments on these undecided issues.

D. The Court of Appeals Had the Authority to Order Further Hearings on the Question of the Amount of Recoverable Damages.

This point was previously discussed at pages 28-31 of HRI's brief in opposition to the mandamus petition.

This Court pointed out the extent to which the original damage award had been based on pre-damage period conduct, stating:

> "Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of

> the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share. Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, *those operations must have occurred prior* to May 22, 1959. Some part of the damages awarded, therefore, *necessarily resulted from pre-damage period conduct*" (395 U.S. at 116-17).[13]

In other words, since Zenith had only *3%* of the market at the beginning of the damage period rather than the *16%* it alleged it should have had, this Court was in effect pointing out that *over 75% of Zenith's asserted lack of beginning market* share (13%/16%) was, on Zenith's own theory, ascribed to pre-damage period and pre-release conduct.

Under these circumstances it was obvious that a major portion of the original $18,892,173 damage award was based on pre-damage period conduct, recovery of which was barred, and there was no evidence or finding as to *what part* of the damage award resulted from damage period conduct. Accordingly, the Court of Appeals was clearly within the authority of this Court's mandate when it remanded the case to the trial court and stated that:

> "Accordingly, we think that HRI should have—what it was not given at the trial—an opportunity to introduce testimony, in support of its defense of statute of limitations, aimed at excluding from recovery damages flowing from pre-period 'damage-causing' acts, as well as an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage-causing' acts within the period did not amount to $6,297,391.
>
> "The judgment for $6,297,391—before trebling— is

[13] Zenith has repeatedly attempted to dissipate the impact of this Court's analysis by quoting the first sentence of the statement and omitting all reference to the last two sentences (Z. Pet. Cert. 6, Z. Pet. Mand. 7-8, Z. Reply Mand. 3).

> vacated and the cause is remanded for further proceedings consistent with the views expressed in this opinion" (Slip Opinion 7).

Zenith persists in attempting to create the false impression that this Court decided the amount of damage issue without mentioning it, by asserting that "At pp. 147-149 of the HRI main brief in this court the amount of petitioner's [Zenith's] damages was argued at length" (Z. Pet. Cert. 24). This is not the fact. HRI's brief expressly stated:

> "*Zenith* argues the subject of the alleged *amount* of damages in England, Australia, and Canada (Z. Br. 26-28, 53, 56, 76-85), *but that issue is not before this Court.* Although it was raised in the Court of Appeals, it was not decided for that court based its decision entirely on the failure of Zenith to prove damaging impact from pool activities."

HRI commented briefly on Zenith's erroneous contentions only for the purpose of pointing out the nature and extent of the undecided questions (pp. 147-49).

The fact that this Court was limiting its decision to the fact of damage question and that it was not deciding any question concerning the amount of damages is clearly shown by the Court's statement that the fact of damage question required only "proof of *some* damage [emphasis by this Court] flowing from the unlawful conspiracy," and its statement that any "*inquiry beyond this minimum point goes only to the amount and not the fact of damage*" (395 U.S. at 114 n. 9).

IV. There Is No Basis for Zenith's "New Trial" Argument.

This point was previously answered at pages 31-32 of HRI's brief in opposition to the mandamus petition.

In an effort to show that the action taken on remand by the Court of Appeals was unauthorized, Zenith again argues that this Court did not "disturb" the trial court's "denial of a new trial" (Z. Pet. Cert. 24; see also Z. Pet. Mand. 17). Zenith's petition repeats the same "new trial" assertions (Z. Pet. Cert. 3, 8-9, 14-15, 24-25) which appeared in its petition for mandamus (Z. Pet. Mand. 5, 9, 16, 17, 21, 22, 23), suggesting that the issue involved here is a question of a "new trial" as to Canada and whether there has been a showing of "newly discovered evidence" or "abuse of discretion" by the trial court (Z. Pet. Cert. 15-16).

In view of Zenith's persistent misstatement of the facts, it must be pointed out again that HRI's motion to the trial court was not for a "new trial" but for a reopening of proofs and for "further hearings" before entry of judgment, the motion being based in part on the defenses of release and limitations (A. 2939, 2951). The trial court refused to order such further hearings as to Canada because it erroneously believed that the defenses had no merit (see pp. 19-22, *supra*). Thus the case does not involve questions of "abuse of discretion" or "newly discovered evidence" but the fact of *erroneous rulings of law* by the trial court on the issue of the merit of these defenses, which, when corrected by the Court of Appeals now require *further hearings* on the amount of damages, since the original award included alleged damages which were barred by the defenses of release and limitations.

Even if HRIs' motion *had* been for a new trial, however, this Court's failure to disturb the trial court's ruling would have been of no significance to the issue whether the Court of Appeals had authority to order further proceedings. This Court did not "disturb" the trial court's denial of HRI's motion for the obvious reason that the only issue it

decided was the fact of damage, and it left the other issues for decision by the Court of Appeals on remand. The determination whether further proceedings in the trial court were necessary could only be made *after* the Court of Appeals had ruled on HRI's other "major points" of appeal.

Zenith also incorrectly asserts that the remand for further hearings is contrary to the admonition of this Court that "the court below not attempt to deal with *questions of fact 'de novo'* and to follow the teaching and rationale of the *Bigelow* case" (Z. Pet. Cert. 14, Z. Pet. Mand. 15). In *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251 (1946), the Court of Appeals had reversed a treble damage judgment on the ground that there was not sufficient evidence to sustain the verdict of the jury on the facts. In the instant case the Court of Appeals had before it and reversed the trial court on *questions of law*, namely, whether the defenses of release or limitations barred recovery of damages based on pre-release and pre-damage period conduct. Contrary to Zenith's contentions (Z. Pet. Cert. 15), in remanding for further proceedings to give effect to these defenses, the Court of Appeals was not challenging the "trial court's damage findings in Canada." As this Court specifically pointed out, the trial court's findings as to the amount of damages included damages which "necessarily" resulted from pre-damage period conduct (395 U.S. at 116-17). In other words, there *were no findings* as to amount of damages based solely on damage period conduct, and the necessity for further hearings in the light of the affirmative defenses is clear.[14]

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[14] Zenith's current petition states that "Counsel for HRI now concede that only a question of law was involved and this Court did not in any way disturb the trial court's decision" (Z. Pet. Cert. 16). Apparently Zenith is trying to create the mis-impression that HRI's counsel agreed that the issue of a "new trial" was considered

The simple facts are: (a) under this Court's mandate the Court of Appeals was required to determine the applicability and effect of the defenses of release and limitations, and to rule on the question of amount of recoverable damages; (b) the Court of Appeals determined that these defenses apply and bar recovery of damages based on pre-release and pre-limitations acts; and (c) since the trial court's award of damages as to Canada included substantial damages recovery of which is barred by those defenses, there was no evidence and no findings as to the amount of damages which are recoverable, and it was thus necessary to send the case back to the trial court for further hearings to ascertain the amount of recoverable damages.

V. The Court of Appeals Did Not Make the "Holding" as to the June 5, 1959 Letter Asserted by Zenith.

In an attempt to create the semblance of an issue where one does not in fact exist, Zenith has asserted that the Court of Appeals "apparently" held (Z. Pet. Cert. 17, 20) that on remand Zenith's damages must be limited to damages flowing from the June 5, 1959 letter. Thus having propounded this alleged issue as Question 6 (Z. Pet. Cert. 3), Zenith argues in Section II that the Court of Appeals limited Zenith's "Damage Proofs to Damages Flowing From the June 5, 1959 Letter" (Z. Pet. Cert. heading and text pp. 15-17) and then proceeds to reiterate this same contention in Section IV (Z. Pet. Cert. 20-21).

This argument appeared in Zenith's earlier petition (Z. Pet. Mand. 5, 17-18, 20) and was answered briefly (HRI

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and rejected by this Court, whereas in fact HRI's counsel was pointing out (HRI Br. Opp. Mand. 31-32) that the issue of release and limitations involved a "ruling of law" and obviously the question of necessity for further hearings could not be determined until the Court of Appeals had passed on those legal questions.

Br. Opp. Mand. 26 n. 14), but since Zenith now has seen fit to make it a substantial part of both Sections II and IV of its current petition we will deal with it here in somewhat greater detail.

There is no basis for this attempted rewriting of the Court of Appeals' second opinion. Nowhere did the Court of Appeals hold that Zenith's recovery was limited to damages flowing from the June 5, 1959 letter. Rather, the Court of Appeals held that recovery of damages resulting from pre-release conduct was barred by the releases (Slip Opinion 4, 6-7), that recovery of damages flowing from pre-damage period conduct was barred by the statute of limitations (Slip Opinion 4-5, 6-7), but that Zenith could recover damages resulting from conduct which took place within the damage period (Slip Opinion 5, 7).

Having decided that recovery was limited to the damages caused by conduct which took place during the damage period, the Court of Appeals pointed to the June 5, 1959 letter wherein the Canadian pool wrote to Zenith charging infringement, obviously as an illustration of conduct during the four-year period for which it could claim the right to recover damages (Slip Opinion 5).

Nowhere in the opinion is there any holding that Zenith's recovery is *limited* to damages resulting from that letter. On the contrary, the Court of Appeals held that Zenith was entitled to recover all damages suffered during the damage period resulting from conduct which took place during the damage period.

VI. The Question of Tolling of the Statute of Limitations Is Not Before This Court and Is Not Involved on This Record.

By its Questions 4 and 9 (Z. Pet. Cert. 2, 4), its Statement (p. 7), and Section III of its petition (pp. 18-20),

Zenith asserts that the question is presented whether the four-year statute of limitations was tolled during the pendency of *United States* v. *General Electric, et al.* (Civil Action No. 140-157, S.D. N.Y.), in which Hazeltine Corporation (not Hazeltine Research, Inc.) was named as co-conspirator but not joined as a defendant.

Zenith made this same argument in its petition for mandamus, although it did not seek to dignify it by a separate section (Z. Pet. Mand. 19-20; see HRI Br. Opp. Mand. 33-35).

The question whether pendency of government litigation tolls the statute of limitations as against a party in a civil suit who is not a defendant in the government litigation, was not before the Court of Appeals, since Zenith never pleaded or asserted tolling in the trial court. Indeed, Zenith's actions in the trial court affirmatively show that Zenith never intended to and could not rely on tolling.

The Court of Appeals in a footnote to its opinion (Slip Opinion 5 n. 3) pointed out that the question of tolling was not before the court, but commented that under the most recent case in the circuit, tolling did not apply to a non-defendant in the government suit (HRI Br. Opp. Mand. 33-35). This was *dictum*, for not only is the issue of tolling not presented, but any claim of tolling is in *direct conflict* with the sworn representations and statements of Zenith's counsel which formed the basis of Zenith's counterclaim.

In our brief opposing Zenith's mandamus petition, we set forth briefly the background showing that the issue of tolling was not presented (HRI Br. Opp. Mand. 33-34). Since Zenith now devotes a separate section to the argument, we believe it appropriate to point out further what the circumstances were in relation to Zenith's counterclaim.

Zenith's answer to HRI's patent infringement complaint was filed on April 7, 1960 (A. 1, 14-19). It alleged in paragraphs 12 and 13, domestic patent practices and patent pools in Canada and elsewhere, as misuse and "unclean hands" defenses, but asserted no counterclaim (A. 14-19). Approximately three years later on May 22, 1963, Zenith was granted leave to file and filed its counterclaim alleging, among other things, injury to its Canadian business (A. 64-69).

To obtain leave to file this counterclaim three years after the answer, Zenith filed the sworn affidavit of Francis W. Crotty, a Zenith vice president, and patent counsel, and who was a counsel of record in this case. In the affidavit Crotty stated that *"the matters* alleged in paragraphs 6-9 of defendant's counterclaim, to which this affidavit is attached, and *which are the proximate cause of damages alleged* and require the relief sought in said counterclaim, *occurred after the filing of the answer herein"* (A. 63, para. 2). A similar representation was made in Zenith's motion for leave to file, where Zenith counsel represented that the counterclaim arose out of the matters set forth in defendant's answer, *"and current related unlawful activities* of plaintiff occurring since the filing of the answer *which activities are the proximate cause of* present and continuing *damage* to defendant sustained after the filing of the answer" (A. 62). Thus, although alleged matters occurring prior to the filing of the answer would relate to the identification of the alleged conspiracies and to the right to the injunctive relief prayed, Zenith obtained leave to file its claim for damages on the basis of the express representation that it was only claiming damages resulting from matters occurring *after* April 7, 1960, the date Zenith filed its answer.

Furthermore, Zenith's counterclaim did not allege the *United States* v. *General Electric* litigation nor assert toll-

ing, and, indeed, it could not have done so in light of the limitations on Zenith's damage claim asserted in its sworn affidavit and motion.

To subsequently assert that Zenith was entitled to rely on a tolling of the statute of limitations and thereby claim damages based on acts taking place as early as 1954, is a direct contradiction of Zenith's sworn representations, and if permitted would involve a major change in the scope of its counterclaim for damages.

The cases establish that tolling by reason of the pendency of government litigation should be affirmatively alleged as a part of the cause of action if it is to be relied on. See *Tague* v. *Balaban,* 1956 Trade Cas. ¶ 68,539 (N.D. Ill. 1956); *National & Transcontinental Trading Corp.* v. *International General Electric Co.,* 15 F.R.D. 379 (S.D.N.Y. 1954).[15]

Zenith's counsel well knew that tolling should be pleaded if it was to be relied upon. As we pointed out (HRI Br. Opp. Mand. 34), in the amended and supplemental counterclaim filed by Zenith in the RCA-Zenith litigation (PX 42, A. 2743-50), Zenith expressly set forth government litigation and alleged "tolling of the statute of limitations because of said Government suit" (A. 2746).[16]

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[15] The rule here is analogous to the requirement that "fraudulent concealment" be pleaded if it is to be relied on as tolling the statute of limitations. *Moviecolor Ltd.* v. *Eastman Kodak Co.,* 288 F.2d 80, 88 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961); *Kansas City* v. *Federal Pacific Electric Co.,* 310 F.2d 271, 284 (8th Cir. 1962), *cert. denied,* 373 U.S. 914 (1963); *Swan* v. *Board of Higher Education,* 319 F.2d 56, 61 n. 9 (2d Cir. 1963); and *Picoult* v. *Ralston Purina Co.,* 1969 Trade Cas. ¶ 72,681 (S.D.N.Y. 1969).

[16] In the instant case, Zenith's claim of damages based on pre-damage period conduct appeared in the Findings of Fact, prepared by Zenith and adopted verbatim by the trial court, in which the

When Zenith not only failed to plead tolling but obtained leave to file its damage claim on a basis totally *inconsistent with* a claim of "tolling," the Court of Appeals could reach no other conclusion than the one that it did; namely, that the issue of tolling was not presented.

This situation is analogous to *Moviecolor Limited* v. *Eastman Kodak Company,* 288 F.2d 80 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961) where the Second Circuit held that not only was tolling based on "fraudulent concealment" not pleaded, but that it could not be subsequently pleaded because "the complaint not only does not allege concealment but *substantially negates* it" (288 F.2d at 88). In this case nothing could more "substantially negate" a claim of tolling and the right to rely on pre-damage period conduct as a basis for an award of damages than Zenith's representation to the court in May 1963 that its claim for damages was based on "matters . . . which . . . occurred *after* the filing of the answer herein" [April 7, 1960] (A. 63).

Aside from its attempt to persuade this Court that the Court of Appeals somehow "ruled" improperly on tolling, Zenith makes a new contention. It asserts that "this Court in effect has ruled" that the statute of limitations if applicable "would not run during the pendency of the instant suit" and that the counterclaim would relate back to the filing of the instant suit, citing footnote 2, 395 U.S. at 108. This newly devised contention (it was not

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assertion of damages as to Canada based on alleged conduct going all the way back to the formation of the pool in 1926 was made (Findings XXV-XXX, XXXVI, A. 2903-06, 2908). It was subsequent to these findings that HRI's new counsel obtained leave to plead the defenses of release and limitations, which defenses were not relevant to the counterclaim as pleaded. Zenith at no time sought to assert tolling in the trial court, but first attempted to raise the issue on appeal.

made in Zenith's petition for mandamus) involves a clear misstatement of what this Court said.

In footnote 2 this Court pointed out that Zenith, HRI and the courts below all considered the damage period to be the four years prior to the date of filing of the counterclaim, *i.e.*, May 22, 1959 to May 22, 1963, and "No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959" (395 U.S. at 108 n. 2). Such an argument, and the claim of damage based on pre-damage period conduct, would, of course, have been inconsistent with Zenith's representations which formed the basis of the grant of leave to file the counterclaim.

Finally, even if tolling had applied, Zenith's recovery would still be limited to damages resulting from conduct occurring after September 27, 1957 since all damages resulting from acts taking place during the period from 1926 (when the Canadian pool began) to September 27, 1957, the date of the releases, would be barred. And since Zenith claims that it should have had 16% of the Canadian market beginning May 22, 1959 if it had been allowed to develop the Canadian market during the period from 1926 to May 1959, it is obvious that a substantial portion of its claim would be barred, in any event, by the releases.

VII. Zenith's Assertion That It Should Be Granted Recovery of Damages Even If Barred by Release and Limitations Is Groundless.

This argument was answered at pages 32-33 of HRI's brief in opposition to Zenith's mandamus petition.

Zenith, under a new heading, Section IV (Z. Pet. Cert. 20-23), re-asserts the novel theory (Z. Pet. Mand. 23) to the effect that even though the defenses of release and limita-

tions do apply, this fact should be *ignored* and Zenith awarded the damages resulting from pre-release and pre-damage period conduct.

The purported basis for this theory is that because the *Story Parchment* and *Bigelow* cases have held that there may be liberality in proof of the amount of damages under some circumstances, particularly if the acts of the defendants have made more definite proof impossible, therefore that part of the damage award which is barred from recovery by release and limitations should nevertheless be included in the award. Thus, citing *Bigelow* as purported authority for its contention, Zenith asserts that it is an "irrelevant issue . . . whether or not evidence of damage flowing from pre-damage period acts was mixed into the damage award . . ." (Z. Pet. Cert. 22).[17]

In a word Zenith either asserts that these cases *nullify* the Statute of Limitations (15 U.S.C. § 15b), and the law as to settlement and release and their effect, or Zenith is proposing that the legal effect of these defenses should be *ignored*.

Contrary to what Zenith suggests, it will not be impossible to determine what damage flowed from damage period con-

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[17] Zenith also asserts that because the Court of Appeals commented that the type of evidence Zenith had offered was "competent evidence, prima facie" as a basis for determining damages and because the court made reference to the issue of "excessiveness of the award" (Slip Opinion 6), that the Court of Appeals had somehow acknowledged the propriety of the original award and yet was presuming to question it (Z. Pet. Cert. 21, 7). The fact is, of course, that when the Court of Appeals was referring to "prima facie" competency it was talking about the question of competency absent the interposition of the affirmative defenses, and the reference to "excessiveness of the award" was related to the fact that the award improperly included damages based on pre-damage period conduct.

duct as contrasted to damage resulting from pre-damage period conduct. The method to determine such damages will be to start with Zenith's actual market share at the beginning of the damage period and determine what additional market share Zenith would have achieved and what profits Zenith would have realized during the four-year period, but for the damage period conduct of the Canadian pool. Then subtracting Zenith's actual profits during the four-year period, the difference will constitute Zenith's damage.

It is quite apparent why Zenith asserts it should be entitled to be awarded damages even though barred by release and limitations. The likelihood is that the further hearings will disclose that the award to which Zenith is entitled is only a fraction of $18,892,173. In effect, Zenith is arguing that it is irrelevant if the award includes millions of dollars to which it is not legally entitled.

VIII. There Is No Basis for Zenith's Insinuation That It Is an Embattled Litigant Being Denied Justice by a Prejudiced Court of Appeals.

Zenith's current petition omits the outrageous innuendo of its petition for mandamus that "it is apparent from its two opinions that the court below is going to find successive reasons for denying Zenith the treble damage recovery in this case" (Z. Pet. Mand. 24), but continues its basic pose as an embattled litigant being denied justice by a prejudiced court. Thus, it again makes its charges against Judge Cummings, a member of the hearing panel (Z. Pet. Cert. 6-7), intersperses the brief with insinuations of prejudice by the appellate court (Z. Pet. Cert. 7, 15, 16,

17)[18] and again argues that because the litigation has been pending for a number of years, this is a reason why it ought to be brought to an end, in Zenith's favor (Z. Pet. Cert. 25).

We have already commented on the attacks upon Judge Cummings and upon the entire hearing panel (HRI Br. Opp. Mand. 35-39). In addition to the long delay in claiming disqualification of Judge Cummings (HRI Br. Opp. Mand. 35-37), Zenith's complete lack of good faith is illustrated by the facts as to the charges against Judge Cummings. After the original decision by the Court of Appeals, Zenith filed its petition for rehearing requesting "that the case may be reheard by the entire Court *en banc*" (A. 4265), thereby specifically requesting that the entire court (which included Judge Cummings) should participate. Zenith and its counsel then well knew all of the alleged facts which were supposed to have disqualified Judge Cummings, yet Zenith requested that he participate in a rehearing.

In considering Zenith's pose as a litigant being denied justice there are certain additional facts which may well be considered.

First, Zenith originally got the trial court to enter findings in January 1965 (which Zenith drafted) which, after trebling, would call for a treble damage judgment of almost $49 million (Finding XXXVI, A. 2908), of which about $30 million would have been as to England and

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[18] For example, at page 15, Zenith asserts that the Court of Appeals "limit[ed] the issues to be tried [on further hearings] in such a way as to in effect *destroy* the petitioner's right to recover treble damages in this case." This is sheer nonsense, for the Court of Appeals specifically held that Zenith could recover damages resulting from damage period conduct, and that is all it is entitled to.

Australia and almost $19 million as to Canada. Following only limited further hearings as to England and Australia in late 1965, the trial judge himself recognized in part that he had been misled and reduced his award as to those countries by nearly $14 million, down to approximately $16 million (Amended Finding XXXVI, A. 3537, 3539). On appeal the Court of Appeals held that Zenith in fact had suffered *no damage* in those countries (388 F.2d at 36-37), and this Court affirmed (395 U.S. at 114). If HRI had been denied the opportunity to pursue its remedies, Zenith would have been awarded almost $30 million based on alleged "damages" which it *said* it had suffered, and which in fact it had not.

Secondly, after Zenith got the trial court to enter the findings calling for treble damages of almost $49 million, it was apparent to Zenith that HRI could pay only a small portion of this amount, its net worth at the end of 1964 being only about $3,184,419 (A. 3007). Accordingly, Zenith for the first time asserted that the parent Hazeltine Corporation should be bound by the judgments and the trial court entered the judgments requested by Zenith. However, the Court of Appeals held that the judgments against Hazeltine Corporation were void for want of jurisdiction (388 F.2d at 30) and this Court affirmed (395 U.S. at 110). These proceedings *took time*, but this obviously was no reason to deny the right of Hazeltine Corporation to *expose the invalidity* of the judgments against it.

Now, as to Zenith's Canadian damage claim, Zenith again suggests that the *public interest* requires that Zenith be granted an award of $18,892,173 (Z. Pet. Cert. 17) and that the litigation must be brought to an end in Zenith's favor (Z. Pet. Cert. 25). Let us consider that contention.

This Court agreed that Zenith's damage claim as to England and Australia was not valid (395 U.S. at 114). As to

Canada, this Court concluded there was *some evidence* "although by no means conclusive," sufficient to support the "inference" that Zenith had been injured *"to some extent"* (395 U.S. at 114), but did not decide the question "how much" Zenith could recover. Rather, it remanded the case to the Court of Appeals so that it might consider the undecided issues relating to the affirmative defenses and the amount of recoverable damage in the light of those defenses which had not yet been ruled on by that court.

The Court of Appeals determined the question of release and limitations, as it had the power and duty to do, and since the trial court's original damage award was based in part on pre-release and pre-damage period conduct, it remanded the case to the district court so that the amount of damages to which Zenith was entitled could be determined. Yet Zenith suggests that as a matter of "grave public concern" (Z. Pet. Cert. 17) it should be awarded the entire amount of $18,892,173.

We submit that the acknowledged public policy involved in enforcing the treble damage remedy is no basis for the award of millions of dollars of damages to which a litigant is not legally entitled, particularly when the claimant is one like Zenith, who has already been demonstrated to have been ready to demand $30 million treble "damages" in England and Australia which it did not suffer. As we pointed out before (HRI Reply Br. Opp. Mand. 2-3), Zenith is not some small company fighting for its life but one of the giants of its industry asking to be awarded a sum, which is not only legally unjustified, but which would be totally destructive of HRI, since $18,892,173 is far in excess of its net worth.

We submit that the ends of justice require that these petitions of Zenith be denied so that the case may finally go back to the trial court for a determination of the amount which HRI in fact owes to Zenith.

CONCLUSION

We respectfully submit that Zenith's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 24, 1970

Appendix A to the Brief of Respondent Hazeltine Research, Inc.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1969 — SEPTEMBER SESSION, 1969

Nos. 15246, 15563

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant, Appellant,

v.

ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

OCTOBER 27, 1969

Before CASTLE, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* This court, on December 19, 1967, filed its decision, 388 F.2d 25 (7th Cir. 1967), in the above causes and, so far as pertinent now, affirmed the judgment awarding $150,000, treble damages, to Zenith Radio Corporation for misuse by Hazeltine Research, Inc. (HRI) of its domestic patents, but struck paragraph A of the related injunction, issued to restrain HRI from imposing unlawful conditions on those patents. We reversed the judgment in Zenith's favor for $38,000,000, treble damages, based on HRI's unlawful participation in the Canadian, English and Australian patent pools, and *ipso facto* set aside an injunction restraining HRI's further unlawful antitrust activity in these foreign patent pools.

On appeal to the Supreme Court, the treble damage award with respect to the domestic patents was not challenged. The Court, 395 U.S. 100 (1968), reversed our decision striking paragraph A of the injunction and remanded that part to this court for further consideration. The Court also reversed our decision setting aside the award of damages flowing from the unlawful activity of the Canadian pool and remanded that issue to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award. In addition, the Court reinstated the related injunction which this court had set aside with that treble damage judgment for Zenith.[1] The Supreme Court reversed our decision with respect to the Canadian patent pool because it concluded we erred in our determination that Zenith had failed to prove the "fact" of damage in Canada.

After the Supreme Court mandate was filed in this court, we gave leave to HRI and Zenith to file supplemental authorities. Zenith thereupon "abandon[ed] its request" originally made in this court to reinstate paragraph A which this court had struck. The following questions are before us: (1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had on HRI's liability; and (3) whether the award of damages was excessive. These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith.

We have examined the issues now before us in the light of the Supreme Court opinion and the supplemental authorities cited to us. We vacate the judgment for Zenith with respect to the Canadian pool in the amount of $6,297,391, trebled, and remand for further proceedings with respect to the award of damages.

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[1] The Supreme Court affirmed this court's decision vacating judgments in Zenith's favor against Hazeltine Corporation. It affirmed our decision with respect to setting aside the treble damage judgment so far as it was based on the patent pool activities in England and Australia.

THE AFFIRMATIVE DEFENSES

After the evidence at the trial was closed HRI moved for leave to file the affirmative defenses in bar of Zenith's recovery. Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived. The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. The Supreme Court noted that the district court's refusal to disturb the findings it had already made with respect to the Canadian pool was a rejection of the defenses either on the merits or on the ground that the defenses had been waived under FED. R. CIV. P. 12(h). 395 U.S. 100, 117, n. 13. It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery. We turn therefore to consideration of the correctness of the district court's ruling.

The relevant four year damage period was measured from May 22, 1963, when Zenith filed its counterclaim.[2] The cutoff date therefore was May 22, 1959. HRI relies upon releases given September 27, 1957, by Zenith to RCA, General Electric, and Western Electric in settlement of Zenith's counterclaim in the case of *RCA v. The Rauland Corp. and Zenith Radio Corp.*, No. 48 C 1818 (N.D. Ill. 1957), in contending that Zenith's claim is now barred.

The Supreme Court in noting that the district court did not date the events as occurring before or after the May 22, 1959 start of the damage period, said "[t]he damage award was confined to *injuries* sustained during the damage period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period." 395 U.S. 100, 116 (1968). Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had sixteen per cent of the Canadian market instead of its actual three per cent on May 22, 1959 and throughout the damage period. The Court then stated that

2 See 395 U.S. 100, 108 (1968). 15 U.S.C. § 15b reads:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency, and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded.

Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases. *Twentieth Century-Fox Film Corp v. Winchester Drive-In Theatre,* 351 F.2d 925, 931 (9th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966); *Dura Electric Lamp Co. v. Westinghouse Electric Corp.,* 249 F.2d 5 (3d Cir. 1957). Our inquiry therefore is narrowed to the question of the effect of the statute of limitations on Zenith's right of recovery for post-release misconduct.

It is "well settled . . . that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff." *Nalle v. Oyster,* 230 U.S. 165, 182 (1913). Consequently, in the case before us the mere existence of the conspiracy following the 1957 releases does not itself give rise to Zenith's cause of action. The law with respect to the statute of limitations in Sec. 15b of the Clayton Act is that the period commences to run from the last overt act of the conspiracy. *Crummer Co. v. DuPont,* 223 F.2d 238, 247-48 (5th Cir.), *cert. denied,* 350 U.S. 848 (1955); *Momand v. Universal Film Exchange,* 43 F. Supp. 996, 1007 (D. Mass. 1942), *aff'd* 172 F.2d 37, 47 (1948); *Steiner v. Twentieth Century-Fox Film Corp.,* 232 F.2d 190, 194 (9th Cir. 1956); *Century Hardware Corp. v. Powernail Co.,* 282 F. Supp. 223, 227 (E.D. Wis. 1968). In *Century Hardware,* the district court construed this court's decisions in *Emich Motor Co. v. General Motors Corp.,* 229 F.2d 714 (7th Cir. 1956), and *Baldwin v. Loew's, Inc.,* 312 F.2d 387 (7th Cir. 1963), as stating the law of this Circuit to be in accordance with the foregoing decisions.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 377 F.2d 776 (3d Cir. 1967) (supplemental opinion at 793-95), the following rule was applied:

> [W]here the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period.

The rule as applied in that case was approved by the Supreme Court on appeal of the *Hanover* case. See 392 U.S. 481, 502 n. 15 (1968). Thus, even though Zenith may have had a cause of action for overt acts of the conspiracy prior to May 22, 1959—the beginning of the damage period—the fact that it did not then file suit does not preclude its present suit for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-period acts occurring in the damage period.

HRI conceded at trial that the Canadian pools existed into the damage period. The record establishes that on June 5, 1959, the Canadian pool wrote Zenith claiming that it was infringing pool patents by its distribution of American-made televisions and radios in Canada. This act was substantially similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damages suffered only in the statutory period, is entitled to recover for the damages it suffered as a result of the June 5 injury.[3]

We conclude therefore that the district court's denial of the motion to bar Zenith's recovery completely on the ground of the releases and the running of the statute of limitations was not erroneous.

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[3] Zenith argued in its original brief that the statute of limitations was tolled by reason of Sec. 5(b) of the Clayton Act during the pendency of *United States v. General Electric, et al.* in the Southern District of New York from November 28, 1958 to November 1, 1963. At the trial Zenith did not raise this point in a reply to HRI's affirmative defense, so that, strictly speaking, the point is not properly before us. However, in any event, the law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in the government suit. *Sun Theatre Corp. v. RKO Radio Pictures*, 213 F.2d 284, 292 (7th Cir. 1954). HRI was not a party defendant in that suit, although named as co-conspirator.

EXCESSIVENESS OF THE AWARD

We think this issue is not now ripe for decision because HRI had no opportunity, after the district court permitted filing of HRI's affirmative defenses, to introduce evidence relevant to the affirmative defenses. We vacate the district court's award of $6,297,371—trebled to $18,892,173—and remand for further proceedings.

The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor. There was testimony for Zenith, relied on by the district court, that in the four year damage period, had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, it would have enjoyed the same proportion of that market as it did in the United States market. In Canada its principal competitors were counterparts of its principal competitors in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated, by virtue of the Supreme Court's decision in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946).

The district court in permitting the filing of HRI's affirmative defenses of release and statute of limitations—as an amendment to HRI's defense to Zenith's counterclaim—made it plain in doing so that the court would make no change in its findings and conclusions with respect to damage in the Canadian market. However, we refer again to the statement of the Supreme Court that "[s]ome part of the damages awarded . . . necessarily resulted from pre-damage period conduct." 395 U.S. 100, 116-17. The Court noted that although the damage award was confined to the damage period, the trial court apparently deemed it immaterial whether the "damage-causing" acts occurred before or after the start of the damage period.

Earlier in this opinion we held that the releases only barred Zenith's recovery of damages caused by injuries

inflicted prior to the date of the releases; that the damage period commenced to run from the last overt act of the conspiracy; and that the statute of limitations did not bar recovery of damages caused by "damage-causing" acts within the period. Accordingly, we think that HRI should have—what it was not given at the trial—an opportunity to introduce testimony, in support of its defense of statute of limitations, aimed at excluding from recovery damages flowing from pre-period "damage-causing" acts, as well as an opportunity to introduce evidence to show that Zenith's damage flowing from "damage-causing" acts within the period did not amount to $6,297,391.

The judgment for $6,297,391—before trebling—is vacated and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.